

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:	:	Chapter 11
LEHMAN BROTHERS HOLDINGS INC., et al.,	:	Case No. 08-13555 (JMP)
	:	(Jointly Administered)
Debtors.	:	
 In re:	:	
LEHMAN BROTHERS INC.,	:	Case No. 08-01420 (JMP) (SIPA)
Debtor.	:	

**DECLARATION OF SETH D. ROTHMAN IN SUPPORT OF THE
TRUSTEE'S OBJECTION TO BARCLAYS' MOTION TO
COMPEL PRODUCTION OF DOCUMENTS FROM LBHI, THE
TRUSTEE, THE COMMITTEE AND THEIR FINANCIAL ADVISORS**

I, SETH D. ROTHMAN, declare that the following is true and correct:

1. I am a member of the firm of Hughes Hubbard & Reed LLP, attorneys for James W. Giddens (the "Trustee"), as trustee for the SIPA liquidation of Lehman Brothers Inc. I am an attorney duly admitted to practice in the State of New York and in this Court. I make this declaration based on my personal knowledge and the documents referred to herein.

2. I make this declaration in support of the Trustee's Objection To Barclays' Motion To Compel Production Of Documents From LBHI, The Trustee, The Committee And Their Financial Advisors, for the purpose of introducing copies of documents that are cited in the Trustee's Objection.

3. Attached hereto as Exhibit 1 is a true and correct copy of excerpts of the transcript of the hearing held before this Court on December 16, 2009.

4. Attached hereto as Exhibit 2 is a true and correct copy of excerpts of the transcript of the deposition of Marlo Karp, conducted on January 20, 2010.

5. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of the transcript of the deposition of James B. Kobak, Jr., conducted on December 7, 2009.

6. Attached hereto as Exhibit 4 is a true and correct copy of excerpts of the transcript of the deposition of Christopher Kiplok, conducted on March 4, 2010.

Executed on April 23, 2010
New York, New York

By: /s/ Seth D. Rothman
Seth D. Rothman

Exhibit 1

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555 (JMP)

Adv. Case No. 08-01420 (JMP) (SIPA)

Adv. Case No. 09-01480

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.,

Debtors.

- - - - - x

SECURITIES INVESTOR PROTECTION CORPORATION,

Plaintiff-Appellant,

-against-

LEHMAN BROTHERS INC.,

Defendant.

- - - - - x

PT BANK NEGARA INDONESIA (PERSERO) TBK,

Plaintiff,

-against-

LEHMAN BROTHERS SPECIAL FINANCING, INC.,

Defendant.

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(continued on next page)

1 At the outset, the Court examines the relevant law
2 governing the attorney-client privilege. This privilege exists
3 to encourage full and frank communication between attorneys and
4 their clients, and thereby promote broader public interest in
5 the observance of law and the administration of justice. See
6 *Morande Auto Group v. Metropolitan Inc.*, 2009 WL 650444 at *2
7 (D. Conn., Mar. 12, 2009). Accordingly, courts in the Second
8 Circuit have exercised great caution when construing rules
9 resulting in the waiver of the privilege. *Per re: the County*
10 *of Erie*, 546 F.3d 222 at 228 (2nd Cir. 2008). An excerpt from
11 that case, "Rules which result in the waiver of this privilege
12 and thus possess the potential to weaken attorney-client trust
13 should be formulated with caution."

14 Generally, courts have found that parties implicitly
15 waive the attorney-client privilege in three factual scenarios.
16 When a client testifies concerning portions of the attorney-
17 client communication, when a client places the attorney-client
18 relationship directly at issue, and when a client asserts
19 reliance on an attorney's advice as an element of a claim or
20 defense. *County of Erie*, 546 F.3d at 228. It is this third
21 instance of at issue privilege waiver on which Barclays relies.
22 *County of Erie* sets forth the applicable legal standard in the
23 Second Circuit for determining implied at issue waiver of
24 attorney-client privilege. That case defined the test as
25 whether the moving party can prove that the opposing party

1 "relied on the privileged communication as a claim or defense,
2 was an element of a claim or defense." 546 F.3d at 228.
3 County of Erie examined whether e-mails exchanged between a
4 county attorney's office and sheriff's office concerning strip
5 searches were admissible in a lawsuit challenging their
6 constitutionality. The defendants in that case invoked an
7 objective, qualified immunity defense in that they believed
8 their conduct had been legal. County of Erie, 546 F.3d at 229.
9 The Second Circuit held that the defendant's reliance on an
10 objective, rather than subjective legal defense did not
11 constitute an issue waiver. As stated in that case,
12 "Petitioners do not claim a good faith or state of mind
13 defense. They maintain only that their actions were lawful or
14 that any rights violated were not clearly established. In view
15 of the litigation circumstances, any legal advice rendered is
16 irrelevant to any defense so far raised."

17 Moreover, the Second Circuit emphasized that a finding
18 of waiver requires actual reliance on privileged advice,
19 whereas the "mere indication" of privileged advice is
20 "insufficient to place legal advice at issue." Under the test
21 as enunciated in Erie, then, the 60(b) motions filed by the
22 trustee and the committee did not implicitly waive the
23 attorney-client privilege with respect to their advisor's
24 knowledge and understanding of the sale transaction. Despite
25 Barclays' arguments to the contrary, the claims asserted by the

1 trustee and the committee in the 60(b) motions do not rely on
2 any legal advice provided by their respective advisors, with
3 regard to the sale transaction. Instead, these claims rely on
4 allegedly misleading and incomplete public representations made
5 to the Court at the sale hearing and on the alleged failure of
6 Barclays and certain Lehman executives to say anything to
7 contradict those representations. In other words, the claims
8 asserted by the trustee and the committee in the 60(b) motions
9 constitute what I'll call objective claims, asking the Court to
10 compare in-court disclosures concerning the sale transaction
11 with the provisions of the sale transaction as actually
12 consummated. Neither the trustee nor the committee asserts
13 claims based on their subjective state of mind at the time of
14 the sale hearing.

15 The Court is also not persuaded by Barclays insistence
16 that the context of the claims of the trustee and the committee
17 and the 60(b) motions means that they necessarily waive the
18 attorney-client privilege. At bottom, Barclays seems to argue
19 that reliance that purported mistakes and newly discovered
20 evidence means that the claims for relief under Rule 60(b)
21 necessarily implicate the contemporaneous advice provided by
22 professionals for the trustee and the committee at the time of
23 the sale hearing. Based on the Court's review of these
24 motions, the Court disagrees. The committee argued at the
25 hearing and in its 60(b) motion that the newly discovered

1 evidence underlying its 60(b) motion consists of discovery
2 unearthed during the Rule 2004 investigation, purportedly
3 demonstrating misrepresentations and nondisclosures related to
4 the sale transaction. The trustee's 60(b) motion makes clear
5 that his arguments, with respect to mistakes, are, in fact,
6 premised on insufficient disclosure to the Court. Thus the
7 60(b) motions simply do not implicate and rely on the advice
8 given by attorneys.

9 This holding on at issue waiver comports with widely-
10 recognized principles of public policy. The attorney-client
11 privilege is critically important to ensuring open and frank
12 communications between attorneys and their clients. For this
13 reason, policy considerations weigh in favor of strictly
14 construing any implied waivers of the privilege such as urged
15 by Barclays.

16 Barclays is not unfairly prejudiced by this holding
17 because other means exist for it to obtain relevant information
18 in support of its defense to the 60(b) motions. The agreement
19 by LBHI to share otherwise privileged information is certainly
20 one important source.

21 Additionally, Barclays remains free to pursue
22 discovery from third parties that provided information to the
23 committee and the trustee's advisors concerning the sale
24 transaction. Accordingly, Barclays is not worse off in that it
25 has not been denied access to information vital to its claims.

1 See County of Erie 546 F.3d at 229.

2 Moreover, should it become apparent at a later date
3 that the claims of the trustee or the committee as actually
4 presented, do, in fact, rely on legal advice provided by their
5 respective professionals, then Barclays remains free to assert
6 an at issue waiver at that time and seek additional related
7 discovery.

8 Finally, the fact that LBHI has agreed to produce
9 otherwise privileged documents to Barclays is not relevant to
10 any purported privilege waiver by either the trustee or the
11 committee. The trustee and the committee are not similarly
12 situated to LBHI with respect to the current dispute.

13 As mentioned by counsel for LBHI on the record at the
14 hearing, LBHI viewed itself as distinct from the trustee and
15 the committee because LBHI made representations to the Court
16 with respect to the sale transaction at the sale hearing and
17 LBHI initiated the Rule 2004 discovery from Barclays. LBHI
18 also based its 60(b) motion in part on the contention that its
19 attorneys were kept in the dark with respect to changes in the
20 sale transaction.

21 The motion by Barclays is denied without prejudice to
22 bringing a later motion should it become clear at some future
23 date that the committee or trustee is relying on privileged
24 communications to support 60(b) relief. That's the ruling of
25 the Court.

Exhibit 2

1

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 In Re:

6 Chapter 11

7 LEHMAN BROTHERS Case No. 08-13555 (JMP)

8 HOLDINGS, INC., et al, (Jointly Administered)

9 Debtors.

10 -----x

11

12 DEPOSITION OF MARLO KARP

13 New York, New York

14 January 20, 2010

15

16 Reported by:

17 MARY F. BOWMAN, RPR, CRR

18 JOB NO. 27306

19

20

21

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23

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1 KARP

2 educational background?

3 A. I have a BS/BA from Washington
4 University in St. Louis, and I have a master's
5 from Columbia University.

6 Q. And what is the master's in?

7 A. Finance.

8 Q. So are you an accountant?

9 A. Yes, I am.

10 Q. When did you first have any
11 involvement with the Lehman/Barclays
12 transaction?

13 MR. ROTHMAN: Are you asking her
14 personally or Deloitte?

15 Q. That's a good distinction. They may
16 conflate.

17 When did Deloitte first have any
18 involvement with the Barclays/Lehman
19 transaction?

20 A. We received a call from SIPC, either
21 the 15th or 16th of September, asking whether or
22 not Deloitte might be -- have the time and be
23 able to help if Lehman Brothers, Inc. went into
24 liquidation.

25 Q. And was it a -- what was your

1 KARP

2 contract, you may have raised that?

3 A. It was purely unclear as if we
4 understood -- if we had any specific questions
5 as to -- that might affect our role, and we
6 didn't have any specific questions regarding our
7 role. That was all we looked at it from.

8 Q. At any point did anyone from Deloitte
9 provide an analysis of the APA or the purchase
10 agreement?

11 A. No. We were not asked to do so.

12 Q. Let me go ahead and show you a
13 document that without the cover has been
14 previously marked, but we will go ahead and mark
15 this as 566.

16 (Exhibit 566, document Bates stamped
17 DT 303 to 356 marked for identification, as
18 of this date.)

19 MR. ROTHMAN: Go ahead, look through
20 it.

21 Q. Does that appear to be the document
22 you referred to as the APA and that Deloitte
23 received on approximately September 18, 2008?

24 A. The draft that we received had a bunch
25 of markups on it, handwritten notes. So it

1 KARP

2 as Exhibit 567, do you recognize this document?

3 A. Yes.

4 Q. Can you describe what it is, please.

5 A. I believe it is referred to as the
6 clarification letter.

7 Q. And did you understand it to revise
8 and amend the original asset purchase agreement?

9 MR. ROTHMAN: Objection to the form.

10 A. I understood that it was in addition
11 to the asset purchase agreement. I don't know
12 that it -- I know it was afterwards that may
13 have changed some of the terms.

14 Q. And is it your understanding that this
15 is part of the deal that the parties consummated
16 on September 22, 2008?

17 A. That's how it has -- sorry.

18 MR. ROTHMAN: Go ahead.

19 A. That's how it has been described to
20 me.

21 Q. When was the first time you received
22 that document, the clarification letter?

23 A. It would have been the same time I
24 received the final version of the APA, so early
25 October.

1 KARP

2 Q. And what was the -- why was Deloitte
3 sent a version of the final APA and the
4 clarification letter?

5 MR. ROTHMAN: Let me just caution you
6 not to reveal any conversations or things
7 that you might have learned from counsel
8 concerning that question.

9 A. We generally request documents for our
10 engagements for our file so we understand what's
11 going on. These would be typical documents we
12 would have requested versions of to understand.

13 Q. Was anyone from Deloitte at any of the
14 bankruptcy court hearings related to the
15 Lehman/Barclays transaction in September of
16 2008?

17 A. No.

18 Q. Was Deloitte following those hearings
19 in any way?

20 A. Following, no. I believe we received
21 a phone call at that weekend letting us know
22 that the hearing, that the hearing had gone
23 through, the sale was going to go through, but
24 we were asked not to do anything else at that
25 time.

1 KARP

2 Q. Is that a phone call you received
3 personally?

4 A. No.

5 Q. Was -- was Deloitte aware that the
6 clarification letter was being finalized over
7 that weekend of the 20th and 21st over at Weil
8 Gotshal?

9 A. I don't know when we knew about the
10 clarification letter.

11 Q. Was anyone from Deloitte ever over at
12 Weil or Lehman prior to September 22?

13 A. No.

14 Q. So you were, Deloitte was relying on
15 reports from others in terms of what was going
16 on with the negotiation of the deal, the
17 finalization of the deal?

18 A. Yes.

19 Q. And what was the -- what work did
20 Deloitte do in that month of September?

21 A. We attended a meeting on the 22nd at
22 75 -- the 745 building, the building with the
23 trustee, his counsel, Weil Gotshal, a lot of
24 attorneys, a lot of former Lehman personnel
25 there as well, where we started getting some

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2 information about where we could sit, how we
3 would get documents, how we would get books and
4 records.

5 Basically sat there -- it was an
6 organizational meeting at that point, and that
7 is all we were asked to do for pretty much that
8 first week, was just try to get organized, start
9 getting teams organized, people, because we were
10 asked to not do anything while the customer
11 transfers were going on.

12 Q. What was the goal of the getting
13 organized? Getting organized to do what?

14 A. To proceed with the SIPA liquidation
15 process, so how would we do claims, how would we
16 marshal the assets of the firm, just build on --
17 what teams would work on what with which
18 attorneys from Hughes Hubbard, and that was --
19 and where would we sit, because it would be a
20 large group of people.

21 Q. When was the first time Deloitte had
22 conversations with someone other than Hughes
23 Hubbard or the trustee concerning the
24 transaction?

25 A. We received a phone call from SIPC

1 KARP

2 back on the 15th or 16th about the potential for
3 it, and John Manley had subsequent conversations
4 with SIPC once or twice during that week as it
5 became clear it might actually go into
6 liquidation, to find out if there were
7 conflicts.

8 Q. Did Deloitte ever meet with Weil
9 Gotshal to discuss the deal?

10 A. No.

11 Q. Do you know if they met with Houlihan?

12 A. No.

13 Q. No, you don't know or --

14 A. No, they did not.

15 Q. Did it ever become important to
16 Deloitte's work to understand what assets and
17 liabilities had been transferred as part of the
18 Lehman Barclays sale transaction and what
19 hadn't?

20 A. Not in that context. It became
21 important to understand what assets were under
22 the trustee's control in order to begin the
23 customer claim process, which is where our focus
24 was.

25 Q. To understand what assets were still

1 KARP

2 under the trustee's control, was it important to
3 understand which of LBI's assets had been
4 transferred over to Barclays?

5 A. It was part of the -- it was part of
6 the understanding, but our first priority was to
7 get a handle on what assets were -- what cash
8 securities and other assets were under the
9 trustee's control or we needed to get under the
10 trustee's control. That was our primary
11 responsibility.

12 Q. So you were -- the goal was more in
13 terms of establishing what the trustee still
14 controlled, but one part of achieving that goal
15 was understanding what had been transferred in
16 the purchase agreement and what had been
17 retained, correct?

18 MR. ROTHMAN: Objection to the form.

19 You can answer the question.

20 A. That became the next step of the
21 process, but we didn't have access to the books
22 and records to validate a lot of that
23 information, so it became more important for us
24 to make sure that we could get all the assets
25 that were -- that we thought belonged to LBI

1 KARP

2 under the trustee's control first, and as we got
3 access we would then proceed to see what was
4 left, what was still owed to customers.

5 Q. When Deloitte received the
6 clarification letter in early October, did it
7 review the clarification letter?

8 A. I know I read through parts of it. I
9 would -- I don't know about the others.

10 Q. Let me ask you to look at 567 and ask
11 about a few sections that are -- on the first
12 page, see where it says "purchased assets,
13 excluded assets"?

14 A. Yes.

15 Q. And then subparagraph 2 there,
16 capital A, it says, "The securities owned by LBI
17 and transferred to purchaser or its affiliates
18 under the Barclays repurchase agreement as
19 defined below, as specified on Schedule A,
20 previously delivered by seller and accepted by
21 purchaser." Do you see that?

22 A. Yes.

23 Q. And if you flip to page 5,
24 paragraph 13, where it's entitled "Barclays
25 Repurchase Agreement," it says, "Effective at

1 KARP

2 Q. Can I ask what -- it seems like you
3 were clarifying your language. Was there
4 something you were going to say before that?

5 A. We have been in the process of
6 creating a draft balance sheet, but Deloitte
7 hasn't been doing the valuations.

8 Q. Who has been doing the valuations for
9 the draft balance sheet?

10 A. The valuations have been coming from
11 third-party sources and Barclays.

12 Q. What were the third-party sources?

13 A. They are publicly available sources.
14 The two that I remember are Bloomberg and IDSI.

15 Q. Is that work still going on?

16 A. Yes.

17 Q. When did Deloitte first work on in any
18 way a balance sheet for BLI?

19 A. It started in late '08. We did not
20 have access to the books and records until
21 around that time to be able to get the details
22 to start creating a balance sheet.

23 Q. What was the purpose of creating a
24 balance sheet?

25 A. To determine what the assets and

1 KARP

2 liabilities existed as of 9/19/08, the date of
3 liquidation.

4 Q. And Deloitte is still working on that
5 balance sheet today?

6 A. Yes.

7 Q. After you got the books and so forth,
8 records, why is it taking so long to do the
9 balance sheet?

10 MR. ROTHMAN: Objection to the form.

11 A. There is a lot of reconciliation work
12 that had to be done in order to create the
13 balance sheet.

14 Q. And just explain in a little more
15 detail the type of reconciliation work.

16 A. Yes. There were over 200,000 failed
17 transactions between LBI and LBIE that need to
18 be reconciled.

19 There were, I believe, 10, 11 thousand
20 cash breaks related to the bank accounts.

21 We had difficulties in obtaining
22 statements from depositories where securities
23 were being held. All that took time to get the
24 statements and the information and to begin
25 reconciling the data.

1 KARP

2 And in addition, our ability to access
3 the data came in spurts, as we worked through
4 different issues with Barclays on access.

5 Q. Was it difficult to value some of
6 LBI's assets?

7 MR. ROTHMAN: Objection to the form.
8 Objection -- go ahead.

9 A. We didn't value the assets.

10 Q. Was it difficult to obtain valuations
11 of the assets that you believed, that Deloitte
12 believed were reliable valuations?

13 MR. ROTHMAN: Objection to form.

14 A. We didn't say one way or the other
15 whether or not the valuations were reliable.
16 That determination was not made by Deloitte.

17 Q. Who made that determination?

18 A. That -- Barclays provided services by
19 which their price verification group looked at
20 the valuations that were provided and questioned
21 whether or not, whether or not -- they did their
22 questioning methodologies to determine whether
23 or not the valuation methods were appropriate.

24 Q. Did Deloitte agree or disagree with
25 Barclays' determinations?

1 KARP

2 MR. ROTHMAN: Objection to the form.

3 A. We didn't -- we didn't agree or
4 disagree. That was -- the agreement was to rely
5 upon Barclays' pricing.

6 Q. Let me ask more specifically about a
7 couple of these items. First, do you know as of
8 September 16 or thereabouts the amount of
9 retained cash that LBI had?

10 A. No.

11 Q. And when I say "you," I mean Deloitte,
12 not just yourself.

13 A. No, we didn't.

14 Q. Just so I understand, Deloitte has
15 never attempted to identify or figure out the
16 value of these items listed under the purchased
17 assets?

18 A. No.

19 Q. And that would include efforts even
20 using some other third parties to help with
21 valuation? Deloitte has never made that effort
22 to try to identify the value of these items?

23 MR. ROTHMAN: Objection to the form.

24 A. Not these specific -- not -- we -- the
25 only effort we made from putting together

1 KARP

2 may have learned solely from lawyers.

3 Q. You can give a yes or no to begin
4 with.

5 A. I don't know.

6 Q. Now, you referenced an effort by
7 Deloitte to establish some valuations as of
8 September 19, 2008. Is that correct?

9 MR. ROTHMAN: Objection,

10 mischaracterizes her testimony.

11 A. We prepared a balance sheet, but we
12 did not do the valuations.

13 Q. But you attempted to gather
14 valuations, correct?

15 A. Yes.

16 Q. And can you describe the items that
17 you attempted to get valuations for?

18 A. It would have been market value of
19 assets and liabilities on the balance sheet to
20 the extent that these required outside market
21 values.

22 Q. What did Deloitte do to first
23 establish what assets were still -- still
24 belonged to LBI after the Barclays transaction?

25 MR. ROTHMAN: Objection to form.

1 KARP

2 A. We prepared a balance sheet as of
3 9/19, irrespective of any transaction, and
4 obtained bank statements and depository
5 statements to reconcile to 9/19.

6 Q. Did that include obtaining a list of
7 securities that were posted earlier in the week
8 with the Fed as part of the Fed repo?

9 A. Not for the 9/19 balance sheet, it did
10 not. It was only what existed at that date.

11 Q. So you're familiar with the collateral
12 that was supposed to go to Barclays, that was
13 part of the repo that was supposed to go to
14 Barclays in return for Barclays putting up
15 45 billion dollars?

16 A. I understand that there was a Barclays
17 repo transaction.

18 Q. And the securities, for the purposes
19 of your 9/19 balance sheet, how were the repo
20 securities treated as still belonging to LBI or
21 not belonging to LBI?

22 MR. ROTHMAN: Objection to the form.

23 A. We would show a repo transaction. So
24 it would be in a liability.

25 Q. And the liability at that point, the

1 KARP

2 about, you are distinguishing?

3 A. Well, those assets would have been
4 part of the balance sheet.

5 Q. OK.

6 A. So they would have been valued for the
7 balance sheet of 9/19. It would have included
8 that pool.

9 Q. Is the balance sheet -- when do you
10 expect to complete the balance sheet for 9/19?

11 A. I'm not sure.

12 Q. Is it complete with respect to items
13 such as the clearance box assets?

14 A. It's being reviewed at this time by
15 the trustee and his counsel --

16 MR. ROTHMAN: No, don't talk about
17 things that the lawyers are doing, please.

18 Q. It is OK to just indicate that it is
19 not in your bailiwick. It is being reviewed I
20 think is OK to say. Otherwise, it is hard to
21 figure out the story of why.

22 OK, just let me talk about any
23 valuations you have placed on the clearance box
24 assets. Has Deloitte placed, assigned a value
25 to the clearance box assets?

1 KARP

2 A. Deloitte has not done valuation.

3 Q. The valuation that's on the draft
4 balance sheet, do you know how it was obtained?

5 A. They would have been through
6 third-party pricing sources and Barclays.

7 Q. The third-party pricing sources, did
8 Deloitte go out and make use of third-party
9 pricing sources?

10 A. No. Those sources would have come
11 through Barclays and existing Lehman Brothers
12 relationships that continued past bankruptcy.

13 Q. Can you be a little bit more specific
14 on the last part?

15 A. We still have a relationship with
16 Bloomberg to obtain some pricing information.

17 Q. "We" being LBI, the trustee?

18 A. LBI, the estate.

19 Q. Do you know the amounts that are on
20 the draft balance sheet for clearance box
21 assets?

22 MR. ROTHMAN: Objection to the form.

23 A. There is no specific amount for
24 clearance box assets. It's listed as firm
25 inventory.

1 KARP

2 about it, you should direct it to Hughes
3 Hubbard, not a witness.

4 MR. THOMAS: I am going use it to ask
5 some questions. If you want to instruct not
6 to answer based on privilege, you can. But
7 I'm really just using it as a prop because
8 it has dates, it does have some pertinent
9 information on it.

10 Q. There is a reference in the
11 description to the item 10, "Analysis of asset
12 purchase agreement." Do you see that?

13 A. Yes.

14 Q. Did Deloitte ever prepare analysis of
15 the asset purchase agreement?

16 MR. ROTHMAN: No, I am sorry, I
17 object. I'm not going to let her answer
18 questions about the -- try to delve into the
19 privilege log.

20 MR. THOMAS: I'm not delving into what
21 the document is.

22 MR. ROTHMAN: First of all, you have
23 already asked her if she read the APA,
24 Deloitte has read the APA. We have been
25 through this already. Now you are trying to

1 KARP

2 do it in a way that I think is improper.

3 MR. THOMAS: It is simply asking --
4 the question was, did Deloitte ever prepare
5 an analysis of the asset purchase agreement.

6 That can't possibly be privileged. It is
7 certainly a legitimate question.

8 MR. ROTHMAN: You can go ahead and
9 answer.

10 A. No.

11 MR. TECCE: Mr. Thomas, I don't mean
12 to interrupt you. There is an page attached
13 to the back of this that you may want.

14 MR. THOMAS: Let me go ahead and get
15 that back.

16 MR. ROTHMAN: We can rip that out.

17 Q. There is an entry number 12, there is
18 a reference, again, Marlo Karp is you, who works
19 for Deloitte?

20 A. Yes.

21 Q. And Felicia Sokalski also works for
22 Deloitte?

23 A. Yes.

24 Q. There is a reference in the
25 description to Lehman balance sheet, e-mail and

1 KARP

2 A. It was a balance sheet --

3 MR. ROTHMAN: Objection to the form.

4 A. It was a balance sheet for LBI which
5 if I remember correctly basically was trying to
6 show what the result of the sale would do to the
7 financial position, the balance sheet of LBI.

8 Q. Was that relevant to your work at this
9 time in any way?

10 MR. ROTHMAN: Objection to the form.

11 A. No. We were asked to not perform any
12 work at that time until the customer account
13 transfers had been completed.

14 Q. So when did you actually first start
15 doing work?

16 A. Not until after September 26, 2008.

17 Q. And again, I may have asked this
18 already, but your primary focus after
19 September 26, 2008, was what?

20 A. Was to get the information on the
21 assets that were under the trustee's control.

22 Q. Who is Todd Scarpino?

23 A. He is a member of the Deloitte team.

24 Q. I was going to ask you about one more
25 of these here. Item 22, dated September 25,

1 KARP

2 Q. Does he work in your group?

3 A. He was working for me on the project.

4 Q. What project was that?

5 A. The Lehman SIPC liquidation.

6 Q. And when you complete the 9/19 balance
7 sheet, how will you use that document and for
8 what purposes?

9 A. Which? The clean file?

10 Q. No, the balance sheet that's --

11 Deloitte has been working on?

12 A. I don't know. You would have to ask
13 the trustee.

14 Q. OK. You are preparing it for the
15 trustee?

16 A. Yes.

17 Q. Deloitte has been working on it for
18 over a year without any understanding of how it
19 is going to be used?

20 MR. ROTHMAN: Objection to the form.

21 A. Anything that we would know would have
22 been discussions between counsel.

23 Q. This e-mail, it says, "During the past
24 hour, I have been attempting to conduct the
25 exercise we discussed during our 1:30 call."

Exhibit 3

Page 1

1 J. KOBAK

2 UNITED STATES BANKRUPTCY COURT
3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 In Re:

6 Chapter 11
7 LEHMAN BROTHERS Case No. 08-13555 (JMP)
8 HOLDINGS, INC., et al., (Jointly Administered)
9

10 Debtors.
11
12 -----x
13 * * * PARTIALLY HIGHLY CONFIDENTIAL * * *
14 (Pages 144-145 have been marked Highly Confidential.)
15
16 VIDEOTAPED DEPOSITION OF JAMES B. KOBAK, JR.
17 New York, New York
18 December 7, 2009
19
20
21
22
23 Reported by:
24 KATHY S. KLEPFER, RMR, RPR, CRR, CLR
25 JOB NO. 26430

1 J. KOBAK

2 it would be likely if there were another big
3 brokerage liquidation that went into SIPA, they
4 might think of us for doing that. I don't think
5 any of us had something like Lehman in mind, but
6 I think that was the understanding.

7 Q. And so is it fair to say that, at the
8 time he was appointed, the trustee had some
9 expertise in how broker-dealers operate?

10 A. Well, in the mechanics of a SIPC
11 liquidation, particularly.

12 Q. And at the time he was appointed, did
13 the trustee understand the basics of
14 broker-dealer financing?

15 A. I would say yes. I don't know, you
16 know, where you draw the line between basics and
17 details.

18 Q. Fair.

19 A. And it might be different for
20 different brokerage firms.

21 Q. Right. At the time of his
22 appointment, would the trustee have had a basic
23 understanding of what a repurchase agreement
24 was?

25 A. I believe so.

1 J. KOBAK

2 assisted by professionals at my firm and had
3 engaged Deloitte & Touche to act as
4 accountants." Do you see that?

5 A. Yes.

6 Q. When was Deloitte & Touche engaged?

7 A. We talked to them again. I don't know
8 when the engagement letter was signed. It might
9 have been after the liquidation actually began
10 because, again, that I think was approved by
11 SIPC as well as ourselves, but we talked to them
12 shortly before Friday, I don't know if it would
13 have been Wednesday or Thursday. And again,
14 they had a few people involved. Clearly they
15 didn't have time to get a full team together and
16 they really didn't have -- wouldn't have had
17 access to any information anyway.

18 Q. Can you tell me why Deloitte & Touche
19 was engaged?

20 A. Well, we knew we would need an
21 accounting firm to assist us. This is a major
22 liquidation. There are a lot of books and
23 records. There's 200,000 computer systems, or
24 something like that. Substantial work needed to
25 be done to reconcile accounts and so forth, so

1 J. KOBAK

2 17th at some point.

3 Q. And who at the trustee would have been
4 responsible for reviewing this to understand the
5 nature of the deal?

6 A. I think at that time it would have
7 been primarily myself and the trustee.

8 Q. And at the time you reviewed this, did
9 you understand the economics of the deal?

10 A. We understood primarily the economics
11 of the deal, which originally I think was said
12 to involve some \$70 billion of assets against
13 some amount of liabilities, and I think that was
14 the basis for our understanding of the overall
15 economics. We had some understanding at that
16 time of the items that were to be transferred to
17 Barclays. Those -- what we were primarily
18 interested in what would remain behind because
19 that would be our job, to liquidate those things
20 and take care of the customers.

21 Q. And who would you have gotten
22 information from other than Weil Gotshal?

23 A. I think it was primarily Weil Gotshal.
24 I don't know, they may have had one or two
25 businesspeople who I guess at that time would be

1 J. KOBAK

2 correct?

3 A. That's correct.

4 Q. But it did have a series of assets

5 that totaled up to book value of approximately

6 74.3 billion, correct?

7 MR. CARDEN: Objection to form.

8 A. Yes.

9 Q. And it had one set of short positions
10 in the liabilities that was given a value of, a
11 book value of approximately 69 billion, correct?

12 A. That's correct.

13 Q. And the trustee never told anyone that
14 that -- the economics of that transaction was
15 unacceptable?

16 A. No, we did not. I think our
17 understanding was that the -- there was a rough
18 equivalence probably between the value of the
19 assets and the value of the liabilities. And
20 again, our concern was that with really the
21 entity that was going to remain behind.

22 Q. When you say you had an understanding
23 there was a rough equivalence, do you mean 69
24 billion and 74.3 billion represent a rough
25 equivalence of book value?

1 J. KOBAK

2 MR. CARDEN: Objection to form.

3 A. Well, I think there's a rough
4 equivalent of the long positions and the short
5 positions. There are a few other assets. There
6 are also other liabilities. As I've said, I
7 don't think some of the assets probably had the
8 value ascribed to them, and when you put that
9 all together, it seems to me you have a deal
10 where it's fairly -- the assets and the
11 liabilities are fairly equivalent, at least
12 within a fairly narrow range, I would say.

13 Q. What was the narrow range?

14 A. Well, you said 74.3 to 69 plus. I've
15 told you I don't think the 74.3 probably was
16 really worth quite 74.3, but you're talking
17 about something where you probably have, if
18 there were any profit ascribed to the deal, a
19 very narrow profit, possibly at the end of the
20 day there would be a net cost to Barclays. And
21 I think that was our understanding of what was
22 involved.

23 Q. Did the trustee ever communicate to
24 anyone that they would not approve the deal if
25 Barclays recorded a profit on the deal?

1 J. KOBAK

2 A. I don't remember, and this doesn't
3 refresh my recollection in that regard.

4 Q. Do you know whether the trustee ever
5 spoke to either of those gentlemen about the
6 transaction?

7 A. I don't remember.

8 Q. The next sentence of the e-mail says,
9 "The numbers relating to the transaction are
10 still being finalized, so the post-closing
11 amounts are subject to change." Do you see
12 that?

13 A. Yes, I do.

14 Q. What was the trustee's understanding
15 of that sentence when he received this e-mail?

16 A. That this was a pretty rough and ready
17 balance sheet that kind of gave you, at most, a
18 gross approximation of what we might be talking
19 about.

20 Q. Did the trustee understand that the
21 valuations being given for the assets in this
22 transaction were generally estimates?

23 A. Yes.

24 Q. Did he understand that, given the
25 emergency nature -- let me just make sure we

1 J. KOBAK

2 agree on that. Would you agree that this
3 transaction was negotiated and approved under
4 emergency circumstances?

5 MR. CARDEN: Objection to form.

6 A. I believe the Court described it as
7 extraordinary circumstances, and I would
8 certainly subscribe to that.

9 Q. Under those extraordinary
10 circumstances, would you agree that there was no
11 time to do a final and formal appraisal of all
12 the assets in the deal?

13 A. Yes.

14 MR. CARDEN: Objection to form.

15 Q. And would you agree there was no time
16 to do a formal and final appraisal of all of the
17 financial trading assets in the deal?

18 MR. CARDEN: Same objection.

19 A. Yes, I don't know what kind of
20 analysis might have been done of those things
21 before, if some of them were marked to market on
22 a daily basis, for instance.

23 Q. You don't know whether the assets were
24 being marked to market on a daily basis during
25 the week of September 15 through to September

Exhibit 4

1

2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----X

5 IN RE:

6 Chapter 11

7 LEHMAN BROTHERS Case No. 08-13555 (JMP)

8 HOLDINGS, INC., et al.,

9

10 Debtors.

11 -----X

12

13

14

15 HIGHLY CONFIDENTIAL DEPOSITION OF

16 CHRISTOPHER KIPLOK

17 New York, New York

18 Thursday, March 4, 2010

19

20

21

22

23

24 Reported by:

JOMANNA DeROSA, CSR

25 JOB NO. 27494

1 KIPLOK - HIGHLY CONFIDENTIAL

2 saying is I remember there were other discussions,
3 but I just don't remember specifics. The specific
4 is the point I mentioned about the 250 million.

5 Q. Were you involved at all in the
6 negotiation of the terms of the clarification
7 letter?

8 A. No, not at all.

9 Q. Were you involved in any
10 discussions concerning the terms of the
11 clarification letter over the course of that
12 weekend?

13 A. First of all, I don't think I was
14 aware that a clarification letter existed until
15 sometime into the evening on Sunday, which I guess
16 is the 21st. I was aware that after the parties
17 had left the courtroom, that certain statements
18 had been made on the record that needed to be --
19 I'll use your word -- "clarified," but that -- the
20 understanding I had was that such would have been
21 accomplished shortly after the sale hearing or
22 first thing Saturday morning.

23 So, again, I was focused on account
24 transfers and the like. But Sunday evening I do
25 recall the term "clarification letter" quite

1 KIPLOK - HIGHLY CONFIDENTIAL

2 clearly. I think there were drafts on conference
3 room tables. I never had an opportunity to what
4 I'd say read or review the document. The one
5 thing I do remember is at some point being in a
6 conference room. You know, I was in and out of
7 many as different documents and issues were
8 percolating through the wee hours of the morning,
9 where I believe Mr. Messineo from Weil Gotshal was
10 at a laptop computer, and there was an issue as to
11 the 15c3 account, the clarification letter. And
12 at some point I recall saying to him we need that
13 asset or something along those lines, and his
14 response being, you know, don't worry -- don't
15 worry, we've made -- you know, we've got that
16 covered, and he raised his hand off of the laptop.
17 I recall that.

18 But beyond that session where I was
19 in that conference room, which was -- I think
20 there were three or four Weil Gotshal lawyers and
21 at least a half dozen Cleary lawyers, and a couple
22 of Simpson Thatcher lawyers in the room, I don't
23 recall any -- anything else regarding drafting of
24 the clarification letter.

25 Q. Were you present for any

1 KIPLOK - HIGHLY CONFIDENTIAL

2 discussions concerning the economic terms of the
3 sale transaction?

4 A. No.

5 Q. Did anyone, over the course of that
6 weekend, state or suggest, in any way, to your
7 knowledge, that the -- that the terms of the sale
8 transaction, as captured in the APA and the
9 clarification letter, differed from what had been
10 approved by the Court?

11 A. I don't recall. I don't recall
12 that.

13 Q. Was anyone representing the Trustee
14 tasked with monitoring the negotiation of the
15 clarification letter?

16 A. No. We were -- I think
17 Mr. Frelinghuysen and myself -- Mr. Frelinghuysen
18 had been at Weil Gotshal from the early morning of
19 Saturday, actually. We asked him to go up to
20 execute whatever needed to be done to finalize the
21 deal that had been presented to Judge Peck. And
22 he remained at Weil Gotshal for countless hours
23 and even into Sunday for that to occur, and that
24 did not happen.

25 When I arrived at Weil Gotshal, I